

EXHIBIT E

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The Honorable Frederick P. Corbit
Chapter: 7

7 UNITED STATES BANKRUPTCY COURT
8 EASTERN DISTRICT OF WASHINGTON

9 In Re:

10 GIGA WATT, INC., a Washington
11 corporation,

12 Debtor.

13 MARK D. WALDRON, as Chapter 7
14 Trustee,

15 Plaintiff,

16 vs.

17 PERKINS COIE, LLP, a Washington
18 limited liability partnership; LOWELL
19 NESS, individual and California resident;
THE GIGA WATT PTE., LTD. a Singapore
citizen of the Russian Federation;

Defendants

and

THE GIGA WATT PROJECT, a
partnership,

Nominal Defendant.

NO. 18-03197-FPC11

The Honorable Frederick P. Corbit

CHAPTER 7

Adv. Case No. 2:20-ap-80031

**PERKINS' AND NESS'
OPPOSITION TO TRUSTEE'S
MOTION TO AMEND
COMPLAINT**

1 arbitration would stand or fall based on the allegations in affect at the time of its initial
 2 demand. *See id.* ¶ 35. The Trustee rejected this position. Following these exchanges
 3 between counsel, the Trustee withdrew the Amended Complaint that had been filed
 4 without consent of Perkins or leave of the Court. The Trustee's Motion to Amend
 5 followed. The proposed Amended Complaint filed with the Motion makes further
 6 changes. Importantly, it also *deletes* the entire "partnership" premise of the Trustee's
 7 claims to date and *deletes* that the terms of escrow were incorporated by reference into
 8 the TPAs. The proposed Amended Complaint *deletes* the substance of at least the
 9 following paragraphs of the original Complaint relating to partnership and incorporation
 10 by reference: ¶¶ 10, 11, 17, 18, 19, 20, 25, 26, 28, 29, 30, 31, 44, 48, 68, 72, 77, 78.
 11 *Compare* Dkt. 6 with Dkt. 115-2. Nevertheless, the Trustee has continued to suggest
 12 that Perkins should agree to vacate the pending appeal so that it can again demand
 13 arbitration based on the Trustee's proposed new allegations. Perkins has declined to do
 14 so.

15 **III. ARGUMENT**

16 **A. This Court Lacks Jurisdiction to Grant the Motion to Amend.**

17 "The filing of a notice of appeal is an event of jurisdictional significance—it
 18 confers jurisdiction on the court of appeals and divests the district court of its control

1 over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer*
 2 *Discount Co.*, 459 U.S. 56, 58 (1982).

3 Under the “divestment rule,” once an appeal has been taken “the lower court loses
 4 jurisdiction over the subject matter of the appeal.” *Cal. Dep’t. of Toxic Substances*
 5 *Control v. Comm. Realty Projs., Inc.*, 309 F.3d 1113, 1120–21 (9th Cir. 2002). The
 6 divestment rule applies to “those aspects of the case involved in the appeal.” *Id.* at
 7 1120; *accord e.g.*, *City of Los Angeles*, 254 F.3d at 885–86 (interlocutory appeal divests
 8 the district court “of jurisdiction over the particular issues involved in that appeal”);
 9 *Pipe Trades Council of N. Cal., U.A. Local 159 v. Underground Contractors Ass’n. of*
 10 *N. Cal.*, 835 F.2d 1275, 1280 (9th Cir. 1987) (appeal from order denying arbitration
 11 “clearly divests” the lower court of jurisdiction over subject matter of appeal).

12 The divestment rule likewise applies to motions to amend the pleadings that alter
 13 or affect the basis of a pending appeal. *In re Mercedes-Benz Emissions Litig.*, 797 F.
 14 App’x at 698–99. Under the divestment rule, an amended complaint is inoperative
 15 because “suit[s] c[annot] be altered through operation of the Civil Rules during the
 16 pendency of [an] appeal.” *Id.*

17 The Third Circuit’s opinion in *Mercedes-Benz* involves nearly identical facts to
 18 those presented here. There, a motion to compel arbitration was denied. *See id.* While
 19 appeal of the order denying arbitration was pending, the plaintiff filed an Amended

1 pending appeal, and the Court would be free to exercise its discretion as it sees fit at
2 that time.

3 Accordingly, both because it currently lacks jurisdiction to grant the Motion to
4 Amend, and because doing so now would be premature and potentially futile, this Court
5 should wait until the Ninth Circuit issues its decision before considering or ruling upon
6 the Trustee's Motion to Amend.

7 DATED this 17th day of October, 2022.

8 BYRNES KELLER CROMWELL LLP

9 By /s/ Bradley S. Keller

10 Bradley S. Keller, WSBA #10665

11 By /s/ Ralph E. Cromwell, Jr.

12 Ralph E. Cromwell, Jr., WSBA #11784

13 By /s/ Jofrey M. McWilliam

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Attorneys for Perkins Coie LLP and
Lowell Ness

EXHIBIT F

No. 22-35104

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GIGA WATT, INC., a Washington corporation,
Debtor.

MARK D. WALDRON, Chapter 7 Trustee,
Appellee,

v.

PERKINS COIE LLP, a Washington limited liability partnership, and
LOWELL NESS, individual and California resident,
Appellants, and

GIGA WATT PTE., LTD., a Singapore corporation, and ANDREY
KUZENNY, a citizen of the Russian Federation,
Defendants.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
No. 2:21-cv-00159-SAB; Honorable Stanley A. Bastian

**MOTION TO (a) CONTINUE STAY OF PANEL REHEARING PENDING
SETTLEMENT, AND (b) RESTORE LIMITED JURISDICTION TO THE
COURTS BELOW FOR THE SOLE PURPOSE OF SETTLEMENT
APPROVAL**

Bradley S. Keller, WSBA No. 10665	John Munding, WSBA No. 21734	Michael B. King, WSBA No. 14405
Ralph E. Cromwell, Jr., WSBA No. 11784	MUNDING, P.S. 309 E. Farwell Rd., Suite 310	Jason W. Anderson, WSBA No. 30512
Jofrey M. McWilliam, WSBA No. 28441	Spokane, Washington 99218 Telephone: (509) 590-3849	CARNEY BADLEY SPELLMAN, P.S. 701 Fifth Avenue, Suite 3600 Seattle, Washington 98104 Telephone: (206) 622-8020
BYRNES KELLER CROMWELL LLP 1000 Second Ave., Ste. 3800 Seattle, Washington 98104 Telephone: (206) 622-2000		

Exhibit F, Page 1 of 4

I. INTRODUCTION

The parties have reached a tentative settlement. This motion seeks relief that will enable the parties to finalize and effectuate the settlement. Appellants ask this Court to (1) stay Appellants' petition for panel rehearing, including the supplemental briefing ordered by this Court and (2) restore limited jurisdiction to the lower courts for the sole purpose of settlement approval. Appellee has authorized Appellants to notify the Court that Appellee does not object to the relief requested in this motion.

II. FACTS RELEVANT TO MOTION

A. This Court stayed Appellants' petition for panel rehearing pending the Supreme Court's decision in *Coinbase*, which was issued on June 23.

On January 19, 2023, this Court stayed Appellants' petition for panel rehearing pending the Supreme Court's decision in *Coinbase, Inc. v. Bielski*, No. 22-105. See Dkt. 56. On June 23, 2023, the Supreme Court issued its decision in *Coinbase*. See *Coinbase, Inc. v. Bielski*, No. 22-105, 2023 WL 4138983 (U.S. June 23, 2023). The Supreme Court held that a district court must stay its proceedings while an interlocutory appeal on the issue of arbitrability is ongoing, overruling this Court's decision in *Britton v. Co-Op Banking Group*, 916 F.2d 1405 (9th Cir. 1990). In particular, the Supreme Court held that, under *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), filing a notice of appeal confers jurisdiction on the Court of Appeals and "divests the district court

of its control over those aspects of the case involved in the appeal.” *Coinbase*, No. 22-105, 2023 WL 4138983, at *3 (quoting *Griggs*, 459 U.S. at 58). The Court

went on to hold that because “the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially ‘involved in the appeal.’” *Id.* (quoting *Griggs*, 459 U.S. at 58).

As applied to this appeal, the Supreme Court’s decision in *Coinbase* has two important ramifications. First, upon filing appeal of (a) the Bankruptcy Court’s decision denying arbitration and, subsequently, (b) the District Court’s decision affirming the Bankruptcy Court, the Bankruptcy and District Courts, respectively, lost jurisdiction to take further action in this matter. Accordingly, the Bankruptcy Court had no power to allow Appellee to amend his complaint in a manner purportedly removing all claims subject to arbitration to moot this appeal. Under *Coinbase*, this Court must reach the merits of Appellants’ right to arbitration. Before panel rehearing, however, Appellants seek interim relief to permit the parties to attempt to conclude a settlement that requires court approval and a successful conclusion of a related settlement. If settlement is finalized and approved, this appeal would then be rendered moot and would be dismissed.

B. The parties reached a tentative settlement that requires court approval.

Following this Court’s order staying Appellants’ motion for panel rehearing, the parties engaged in protracted settlement discussions with the assistance of the

Respectfully submitted this 6th day of July, 2023.

BYRNES KELLER CROMWELL LLP

By /s/ Bradley S. Keller

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By /s/ Ralph E. Cromwell, Jr.

Ralph E. Cromwell, Jr., WSBA #11784

By /s/ Jofrey M. McWilliam

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By /s/ Jason W. Anderson

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EXHIBIT G

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7 *Attorneys for Mark D. Waldron, Chapter 7 Trustee*

8
9 **UNITED STATES BANKRUPTCY COURT**
10 **EASTERN DISTRICT OF WASHINGTON**

11 In re:
12 GIGA WATT, Inc., a Washington
13 corporation,
14 Debtor.

15 Case No. 18-03197 FPC 11
16 The Honorable Frederick P. Corbit
17 Chapter 7

18 **CHAPTER 7 TRUSTEE'S MOTION
19 FOR ORDER APPROVING
20 SETTLEMENTS**

21 Mark D. Waldron, in his official capacity as the Chapter 7 Trustee hereby
22 moves the Court pursuant to 11 U.S.C. §§ 105 and 363, Bankruptcy Rules 3006,
23 7041, 9019 and L.B.R. 9019-1 for an Order approving the settlement between the
24 Trustee, one the one hand, and Perkins Coie LLP and Lowell Ness, on the other,
25 pursuant to the terms set forth in the *Settlement Agreement and Release* (the
26 “Trustee Agreement”), Exhibit 1, submitted herewith. Related to the foregoing
27 settlement, the Trustee further requests that the Court approve a stipulation
28 (“Sofair Stipulation”) with Rafael Sofair pursuant to which he will dismiss all
29 claims against the estate and withdraw all claims filed in this case in exchange for
30 an allowed general unsecured claim in the amount of \$16,977. Further related to
31 the foregoing settlement, the Trustee requests approval of the stipulation

32 Chapter 7 Trustee's Motion
33 for Order Approving Settlements - Page 1

34 Exhibit G, Page 1 of 3

1 ("Usmanov Stipulation") with Timur Usmanov pursuant to which the Trustee will
2 dismiss his claims against Mr. Usmanov in exchange for a global release.

3 The settlement and related stipulations with Messrs. Sofair and Usmanov
4 are discussed more fully in the following documents filed herewith: (1)
5 *Memorandum of Points and Authorities in Support of the Chapter 7 Trustee's*
6 *Motion for Order Approving Settlements*; (2) *Declaration of Mark D. Waldron in*
7 *Support of the Chapter 7 Trustee's Motion for Order Approving Settlements*; (3)
8 *Request for Judicial Notice in Support of the Chapter 7 Trustee's Motion for*
9 *Order Approving Settlements*; (4) *Submission of Exhibits in Support of the*
10 *Chapter 7 Trustee's Motion for Order Approving Settlements*; and (5) *Declaration*
11 *of Pamela M. Egan Support of the Chapter 7 Trustee's Motion for Order*
12 *Approving Settlements*.

13 WHEREFORE, the Trustee respectfully requests entry of an Order:

14 1. Finding that the Trustee Settlement is fair and equitable;
15 2. Finding that Notice of the Motion complied with all applicable rules
16 and satisfies the requirements of Due Process;

17 3. Granting the Motion;
18 4. Approving the Trustee Settlement;

19 5. Authorizing, but not directing, the Trustee to enter into the Trustee
20 Settlement, the Sofair Stipulation, and the Usmanov Stipulation; and

1 6. Granting such other and further relief as the Court deems necessary
2 and just.

3 | Dated: August 28, 2023

POTOMAC LAW GROUP PLLC

By: /s/ Pamela M. Egan
Pamela M. Egan (WSBA No. 54736)

*Attorneys for Mark D. Waldron, Chapter 7
Trustee*

EXHIBIT H

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Counsel for Defendant

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

GIGA WATT, INC., a Washington corporation,

Debtor.

Case No: 18-03197 FPC 7

The Honorable Frederick P. Corbit

Chapter 7

MARK D. WALDRON, as Chapter 7
Trustee,

Adversary Proceeding No. 21-80053

Plaintiff.

V.

JUN DAM, a California resident, on behalf of himself and a purported class of similarly situated parties

Defendant.

MOTION FOR INDICATIVE RULING [F.R.B.P. Rule 8008]

[No Hearing Requested]

INTRODUCTION

Settlements have been reached in the Trustee's and the Class's cases against Perkins Coie, LLP, *et al.* In the settlement of the adversary action with the Trustee, Perkins Coie will pay \$3 million to the Giga Watt bankruptcy estate. In the settlement of the class action, Perkins Coie will pay \$4.5 million to a class of WTT Token holders. The Trustee's settlement is subject to approval by this Court. The class settlement is subject to approval by Judge Bastian in the district court. Neither the class settlement nor the Trustee's settlement will be effectuated until both receive final approval from their respective courts.

As this Court may recall, it previously issued orders holding three claims in the class action were subject to the automatic stay and the other two claims were preliminarily enjoined. These orders are on appeal in the district court. After briefing on the consolidated appeals was completed, the district court stayed the appeal to permit the parties to discuss settlement. Declaration of Leslie E. Hurst ISO Mtn. for Indicative Ruling (“Hurst Decl.”), ¶ 6.

The class and Perkins Coie are ready to present their settlement agreement to the district court for approval. To do so, the automatic stay and injunction issued by this Court (and on appeal in the district court), should be modified so the settlement may be presented for approval to the district court.¹

Federal Rule of Bankruptcy Procedure, Rule 8008 provides a procedure to restore limited jurisdiction to this Court to modify the stay/preliminary injunction orders.

¹ There is a difference of opinion regarding the necessity of an indicative ruling given jurisdiction resides in the district court while the stay/preliminary injunction orders are on appeal. The class seeks the relief here out of an abundance of caution. Hurst Decl., ¶ 8.

1 Rule 8008 contemplates a three-step process. **First**, this Court issues an
2 indicative ruling stating that **if** it had jurisdiction over the stay/injunctive orders
3 that are on appeal, it would modify the orders to permit the settling parties to
4 seek approval of their settlement in district court. Rule 8008(a)(3). **Second**, upon
5 notice of the indicative ruling (Rule 8008(b)), the district court where the appeal
6 is pending may retain jurisdiction over the appeal, but issue a limited remand to
7 this Court for identified proceedings to occur. Rule 8008(c). **Third**, upon remand
8 and by motion, this Court would be asked to lift the automatic stay and modify
9 the injunction for the limited purpose of permitting Perkins Coie and the class to
10 seek approval of the class settlement in Case No. 2:20-cv-00464-SAB in the
11 district court.

12 Accordingly, the class plaintiff asks this Court to issue an indicative ruling
13 for the reasons set forth herein. A proposed indicative ruling is concurrently
14 submitted.

15 The Trustee and Perkins Coie do not oppose the relief sought by this
16 motion or the proposed ruling. Hurst Decl., ¶ 9.

PROCEDURAL POSTURE

18 On September 26, 2021, the Court ruled that the automatic stay barred the
19 first three counts alleged in the class action. ECF No. 921. The class plaintiff
20 timely appealed the stay order. ECF No. 922.

21 On February 23, 2022, the Court enjoined the remaining two counts in the
22 class action pending resolution of the Trustee’s adversary action against Perkins
23 Coie. ECF No. 38. The class plaintiff timely appealed the preliminary injunction
24 order. ECF No. 40.

1 The two appeals were consolidated by Judge Bastian of the U.S. District
2 Court, Eastern District of Washington under Case No. 2:21-cv-00291-SAB.
3 After the consolidated appeals were fully briefed, Judge Bastian stayed the
4 appeal to permit settlement negotiations. Appeal ECF No. 56. Hurst Decl., ¶ 6.

5 After numerous sessions with settlement mediator Judge Benjamin P.
6 Hursh, and months of follow up settlement negotiations between the parties, the
7 class and Perkins Coie and the Trustee and Perkins Coie each reached
8 settlements of their respective actions. *Id.*, ¶ 7. The settlements now require
9 presentation to and approval by the respective courts. To present the class
10 settlement to the district court for the approval process, the class seeks an
11 indicative ruling and ultimately an order from this Court lifting the stay and
12 modifying the injunction so that settlement proceedings in the district court may
13 commence.

ARGUMENT

15 || I. An Indicative Ruling Is Appropriate

16 Rule 8008 permits the bankruptcy court, through an indicative ruling, to
17 communicate to the district court its intention to provide some specified relief if
18 the appealed matter is remanded. *See In re Halper*, Nos. CC-18-1225-TaLS, CC-
19 18-1226-TaLS, 2019 Bankr. LEXIS 1967, at *8, 2019 WL 2762340, at *3
20 (B.A.P. 9th Cir. June 28, 2019) (“Rule 8008 allows a bankruptcy court to
21 evaluate timely-filed motions for relief where it would otherwise lack decisional
22 authority because an appeal is pending.”); *In re Treasure Valley Marine, Inc.,*
23 *LLC*, No. 16-00927-JDP, 2021 Bankr. LEXIS 8, at *12, 2021 WL 112173
24 (Bankr. D. Idaho Jan. 5, 2021).

1 To seek approval of the class settlement, relief from the automatic
 2 stay/preliminary injunction is arguably needed. *See, e.g., In re Ambac Fin. Grp.*,
 3 No. 08 Civ. 411 (NRB), 2015 U.S. Dist. LEXIS 4468, at *7–8, 2015 WL
 4 342522, at *2 (S.D.N.Y. Jan. 9, 2015) (denying preliminary approval of class
 5 settlement presented without lift of automatic stay by the bankruptcy court).

6 Relief from the automatic stay/preliminary injunction orders will be for the
 7 limited purpose of submitting and seeking approval of the class settlement in the
 8 district court.

9 **II. Cause Exists to Lift the Stay**

10 Section 362(d) provides that “on request of a party in interest and after
 11 notice and a hearing, the court shall grant relief from the stay provided under
 12 subsection (a) of this section, such as by terminating, annulling, modifying or
 13 conditioning such stay for – cause” 11 U.S.C. § 362(d)(1).

14 The term “cause” is not defined in the statute but is to be construed by
 15 bankruptcy courts on a case-by-case basis. *In re Tucson Estates, Inc.*, 912 F.2d
 16 1162, 1166 (9th Cir. 1990). In the context of litigation outside the bankruptcy
 17 court, courts have identified a series of factors that are potentially relevant to the
 18 stay analysis. *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex*
 19 *Specialty Prods., Inc.)*, 311 B.R. 551, 558 (Bankr. C.D. Cal. 2004) (citing *In re*
 20 *Curtis*, 40 B.R. 795, 799–800 (Bankr. D. Utah 1984) and other authorities).
 21 These factors include whether the relief will result in a partial or complete
 22 resolution of the issues. They also consider the interests of judicial economy and
 23 the expeditious and economical determination of litigation for the parties. *Curtis*,
 24 40 B.R. at 799–800.

25

1 Cause exists here to lift the stay if the district court restores limited
 2 jurisdiction to this Court for this purpose. The class settlement between the class
 3 and Perkins Coie will result in a payment of \$4.5 million to class members, i.e.,
 4 WTT Token holders who held tokens as of November 19, 2018. Hurst Decl., ¶ 8.
 5 The class settlement will resolve all claims in the class action against Perkins
 6 Coie. Further, approval of the class settlement by the district court is a condition
 7 precedent to effectuating the Trustee's settlement with Perkins Coie, which will
 8 pay \$3 million to the bankruptcy estate. Similarly, lifting the stay will serve
 9 judicial economy by facilitating a complete resolution of the issues between
 10 Perkins, the Trustee, and the class.

11 **III. Modifying the Preliminary Injunction Is Appropriate**

12 Injunctive relief is equitable in nature. *Official Airline Guides, Inc. v.*
 13 *Goss*, 856 F.2d 85, 88 (9th Cir. 1988). “[A] party is *always* entitled to move to
 14 modify an equitable decree” *Brown v. Plata*, 563 U.S. 493, 561 (2011)
 15 (emphasis in original). *See also N.Y. State Ass'n for Retarded Children, Inc. v.*
 16 *Carey*, 706 F.2d 956, 967 (2d Cir. 1983) (“The power of a court of equity to
 17 modify a decree of injunctive relief is long-established, broad, and flexible.”)
 18 “[A] preliminary injunction decision is just that: preliminary.” *Ctr. for Biological*
 19 *Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (citing *Ranchers*
 20 *Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of*
 21 *Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007)).

22 It is in the best interest of all settling parties (Perkins Coie, the class and
 23 the Trustee) to modify the preliminary injunction order to allow the class and
 24 Perkins Coie to obtain district court approval of the class settlement for the same
 25 reasons that cause exists to lift the automatic stay. Modifying the preliminary
 injunction order will facilitate approval of the class settlement and thus meet a

1 condition precedent to effectuate settlement of the Trustee's adversary action
2 against Perkins Coie. Indeed, neither the Trustee nor Perkins Coie opposes the
3 relief sought by this motion for indicative ruling.

4 **CONCLUSION**

5 Accordingly, the class requests that the Court issue an indicative ruling
6 informing the district court that if the consolidated appeals were remanded for a
7 limited purpose, the Court would upon remand lift the automatic stay for cause
8 and modify the preliminary injunction to permit the class plaintiff to seek
9 approval of the class settlement in the district court.

10 Respectfully submitted,

11 Dated: July 21, 2023

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25
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*Attorneys for Adversary Proceeding
Defendant Jun Dam*

CERTIFICATE OF SERVICE

2 I hereby certify that on July 21, 2023, I electronically filed the foregoing
3 with the Clerk of the Court using the CM/ECF System, which will in turn
4 automatically generate a Notice of Electronic Filing (NEF) to all parties in the
5 case who are registered users of the CM/ECF System. The NEF for the foregoing
6 specifically identifies recipients of electronic notice.

Executed on July 21, 2023.

s/ Dennis McGlothin

DENNIS J. McGLOTHIN

EXHIBIT I

Pamela M. Egan

From: Pamela M. Egan
Sent: Monday, July 24, 2023 9:51 AM
To: Tim Blood; Leslie Hurst; Dennis McGlothin
Cc: Ralph Cromwell
Subject: GW/PC

Attached please find an Objection to the motion for indicative ruling, which the Trustee has asked me to prepare.

We are providing it to you in advance in effort to resolve the outstanding issues without the need for Court intervention.

I will be available after 11 a.m. this morning if you wish to confer.



Objection to
Indicative Ruling...

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This e-mail and any attachments may contain information that is private, confidential, and/or privileged. If you are not the intended recipient, please notify us immediately and destroy all copies of this message and any attachments.

Exhibit I

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*Attorney for Mark D. Waldron, as
Chapter 7 Trustee*

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re Giga Watt, Inc., a Washington corporation,

Debtor.

MARK D. WALDRON, as Chapter 7
Trustee,

VS

Plaintiff

JUN DAM, a California resident, on behalf of himself and a purported class of similarly situated parties,

Defendant.

Case No. 18-03197

Chapter 7

The Honorable Frederick P. Corbit

Adv. Proc. No. 21-80053

TRUSTEE'S OBJECTION TO MOTION FOR INDICATIVE RULING [F.R.B.P. RULE 8008]

I. INTRODUCTION

It is not true that the settlement documents are ready for filing, although tentative settlements have been reached. Outstanding issues between the parties remain. Mr. Dam appears to be trying to force through his settlement approval process before the settlement has been finalized. For this reason alone, the motion for indicative ruling should be denied.

TRUSTEE'S OBJECTION TO
MOTION FOR INDICATIVE RULING – Page 1

Exhibit I

Page 2 of 7

1 In addition, the motion for indicative ruling is deficient in critical respects,
 2 thus threatening to undermine the validity of the settlement approval process.
 3 Out of the hundreds of creditors in the bankruptcy and the thousands of class
 4 members in the class action, some parties may strictly scrutinize the process.
 5 Complying with the rules will ensure that the settlement withstands this scrutiny.
 6 The motion for indicative ruling does not comply with the rules.

7 Therefore, it should be denied.

8 **II. OBJECTION AND REQUEST**

9 The Trustee objects to Mr. Dam's motion for indicative ruling [ECF Nos.
 10 80 and 81] on the ground that it:

- 11 1. It misstates the status of the settlement negotiations, as set forth above;
- 12 2. It lacks underlying motions for relief from stay and to modify the
 preliminary injunction;
- 13 3. It was not filed in the main case as required for relief from stay;¹ and
- 14 4. It does not provide notice in compliance with 11 U.S.C. § 362,
 Bankruptcy Rules 2002 and 4001, L.B.R. 2002-1 and 4001-1, and this
 Court's Limited Notice Order, ECF No. 857 and 880.²

18

19 ¹ Mr. Dam filed it twice in this adversary proceeding.

20

21 ² Mr. Dam's proposed indicative ruling also inappropriately provides that the
 Bankruptcy Court would "accept" a remand from the District Court. ECF 81-1 at
 2:3. Remand is typically an order not a request.

1 The Trustee requests that the Court deny the motion for indicative ruling
 2 without prejudice. If the parties finalize their settlement, Mr. Dam would have the
 3 opportunity to file papers that comply with the rules. After obtaining the
 4 indicative ruling, Mr. Dam would then ask the District Court to remand with
 5 directions to this Court to enter Orders consistent with the indicative ruling.

6 **III. AUTHORITIES**

7 Bankruptcy Rule 8008 “is adapted from Rule 62.1 of the Federal Rules of
 8 Civil Procedure, which provides district courts with the same slate of options as
 9 Bankruptcy Rule 8008.” *In re Fairfield Sentry Ltd.*, 10-13164 (SMB), 2020 WL
 10 4813565, at *7 (Bankr. S.D.N.Y. Aug. 10, 2020), *aff’d sub nom. Fairfield Sentry*
 11 *Ltd. (In Liquidation) by and through Krys v. Citibank, N.A. London*, 630 F. Supp.
 12 3d 463 (S.D.N.Y. 2022). It “conforms bankruptcy practice to that of [Rule 62.1
 13 of] the Federal Rules of Civil Procedure and [Rule 12.1 of] the Federal Rules of
 14 Appellate Procedure. . . .” 10 Collier on Bankruptcy, ¶ 8008.01, p. 8008–2 (16th
 15 ed. 2014)).

16 The first clause in Bankruptcy Rule 8008 (and Civil Rule 62.1) states, “If a
 17 party files a timely motion in the bankruptcy court for relief. . . .” It then provides
 18 that if the Court lacks jurisdiction to consider the motion because of a pending
 19 appeal, it could issue an indicative ruling on the underlying motion. *Id.* Courts
 20 have addressed this issue. *See e.g., Smith v. HSBC Bank USA, N.A.*, 2:15-CV-70,
 21 2018 WL 11413590, at *2 (S.D. Ga. Dec. 4, 2018).

22 By its terms, Rule 62.1 requires an underlying motion for relief.
 23 Without an underlying motion for relief, a Rule 62.1 Motion for
 24 Indicative Ruling fails. Here, the Smiths have not filed a motion for

25 **TRUSTEE’S OBJECTION TO**
 MOTION FOR INDICATIVE RULING – Page 3

Exhibit I

Page 4 of 7

1 relief in addition to their Motion for Indicative Relief. Thus, the
 2 Court cannot take one of the three options permitted by Rule 62.1(a)
 3 (1) - (3).

4 *Accord Medgraph, Inc. v. Medtronic, Inc.*, 310 F.R.D. 208, 210 (W.D.N.Y. 2015):

5 In other words, procedurally there is no basis for an independent,
 6 freestanding Rule 62.1 motion, asking the district court, in the
 7 abstract as it were, to advise the court of appeals what it would do if
 8 the court of appeals were to remand the case. Medgraph has not filed
 9 any motion for relief, apart from its motion under Rule 62.1, and the
 10 motion is subject to denial on that ground alone.

11 *See also Ramirez v. Crews*, 2014 WL 12693226, at *3 (S.D. Fla. Oct. 21, 2014),
 12 *report and recommendation adopted*, 2015 WL 13333652 (S.D. Fla. Aug. 24,
 13 2015), *aff'd sub nom. Ramirez v. Fla. Dep't of Corr.*, 684 F. App'x 927 (11th Cir.
 14 2017) (“Federal Rule of Civil Procedure 62.1 is intended to be used in conjunction
 15 with a separate motion seeking relief, such as a Rule 60(b) motion to vacate
 16 judgment.”); *In re Wyman*, 12-32264-DOF, 2023 WL 2250571 (Bankr. E.D.
 17 Mich. Feb. 27, 2023) (issuing indicative ruling regarding filed motion to set aside
 18 default judgment based on fraud on the court); *In re Temblor Petroleum Co., LLC*,
 19 1:22-CV-01507-ADA, 2023 WL 3119791 (E.D. Cal. Apr. 27, 2023) (issuing
 20 indicative ruling regarding filed motion to amend Sale Order).

21 The indicative ruling motion does not include underlying motions but
 22 instead asks the Court to consider some issues and decide in the abstract what it
 23 would do if such motions were filed. Therefore, it is deficient.

24 Furthermore, the motion ignores the notice requirements. Section 362(d) of
 25 the Bankruptcy Code provides, “On request of a party in interest ***and after notice***

24 TRUSTEE'S OBJECTION TO
 25 MOTION FOR INDICATIVE RULING – Page 4

Exhibit I

Page 5 of 7

1 *and a hearing*, the court shall grant relief from the stay.” (Emphasis added.)

2 L.B.R. 2002-1(a)(1) states:

3 Unless otherwise provided in the Bankruptcy Code, the Federal Rules
 4 of Bankruptcy Procedure, or these rules, whenever the Code or Rules
 5 authorizes any act, or authorizes the Court to enter an order, “after
 6 notice and hearing” or a similar phrase, the party giving the notice
 7 shall clearly state in the notice: (A) The purpose of the notice; (B)
 8 What a party receiving the notice must do in order to object to the
 9 action contemplated by the notice and the time within which an
 10 objecting party must act; and (C) That the act may be performed or
 11 the Court may enter an order without an actual hearing or further
 12 notice unless a written objection is timely served and filed. (2) A
 13 notice may be included with a motion in which case the pleading
 14 shall be captioned as a motion and notice.

10 The notice of indicative ruling ignores this rule. Therefore, it is deficient.

11 Bankruptcy Rule 4001 directs that a motion for relief from stay be served
 12 on parties “as the Court may direct.” L.B.R. 4001-1 provides:

13 A party in interest desiring relief from the automatic stay of an act
 14 against property of the estate shall file a motion and give fourteen
 15 (14) days’ notice in accordance with FRBP 4001 and LBR 2002-1 to
 16 the debtor(s), attorney for the debtor(s), trustee, United States
 17 Trustee, those requiring notice under FRBP 2002(i) and FRBP 4001,
 18 and any other party known to movant claiming an interest in the
 19 subject property.

20 L.B.R. 2002-1(b)(1)(A) and (B) add:

21 (A) Notice, as used in this rule shall mean notice to all creditors,
 22 equity security holders, indenture trustees, the debtor, the chairperson
 23 of any committee appointed in the case, the United States trustee, and
 24 any other parties in interest.

25 (B) Less inclusive notice may be given if not prohibited by the Code
 26 or Rules and specifically allowed by the Court or local rules. Notice
 27 is appropriate if it reaches all those with a potential good faith
 28 objection to the proposed order or action.

29
 30 TRUSTEE’S OBJECTION TO
 31 MOTION FOR INDICATIVE RULING – Page 5

Exhibit I

Page 6 of 7

1 Pursuant to the Limited Notice Order, notice is limited to parties on the
 2 Limited Notice List. ECF No. 880.

3 In this case, Mr. Dam did not file a motion for relief from stay, which
 4 should have been filed in the main case, or provide 14-days' notice as required by
 5 L.B.R. 4001-1. He did not serve his papers on the United States Trustee or the
 6 creditors on the Limited Notice List. This is improper.³

7 Therefore, the motion for indicative ruling is deficient.

8 IV. CONCLUSION

9 WHEREFORE, the Trustee respectfully requests that the Court:

10 1. Deny the Motion for Indicative Ruling (ECF Nos. 80-81) without
 11 prejudice; and

12 2. Grant such other and further relief as the Court deems appropriate
 13 and just.

14 DATED this [*]th day of July 2023.

15 POTOMAC LAW GROUP PLLC

16 By: /s/ Pamela M. Egan

17 Pamela M. Egan
 2219 Queen Anne Ave., #836
 18 Seattle, WA 98109
 Tel.: (415) 297-0132
 19 Email: pegan@potomaclaw.com

20 *Attorneys for Mark D. Waldron, Trustee*

21 _____
 22 ³ Ms. Hurst suggests in her declaration that the Trustee signed off on these papers.

23 That is inaccurate and irrelevant. The parties cannot agree to violate the rules.

EXHIBIT J

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Counsel for Defendant

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

Case No: 18-03197 FPC 7

GIGA WATT, INC., a Washington corporation,

The Honorable Frederick P. Corbit

Chapter 7

Debtor.

MARK D. WALDRON, as Chapter 7
Trustee,

Adversary Proceeding No. 21-80053

Plaintiff,

JUN DAM, a California resident, on behalf of himself and a purported class of similarly situated parties

**NOTICE OF WITHDRAWAL OF
MOTION FOR INDICATIVE
RULING [ECF NOS. 80-81]**

Defendant.

[No Hearing Requested]

**NOTICE TO THE COURT, ALL PARTIES, AND TO THEIR
COUNSEL OF RECORD:**

On July 21, 2023, counsel for Jun Dam and the putative class filed a motion for indicative ruling as a precursor to presentation of the class action settlement agreement to the district court where the class action is pending. Counsel had the concurrence of the Trustee and Perkins Coie that the motions would be filed and had understood that the procedure, form of the motions, service, and notice was also agreed to by all parties.

On July 24, 2023, the Trustee notified the clerk of this court, class counsel and Perkins Coie that it intended to respond to the motion. It provided to counsel the Trustee's written objections.

In light of the Trustee's non-concurrence, the Motion for Indicative Ruling [ECF Nos. 80-81] is hereby withdrawn.

Respectfully submitted,

Dated: July 24, 2023

WESTERN WASHINGTON LAW GROUP PLLC

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Defendant Jun Dam*

**NOTICE OF WITHDRAWAL OF MOTION FOR INDICATIVE
RULING - 2**

Western Washington Law Group PLLC

121 Lake St. S., Suite 201
Kirkland, WA 98033

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will automatically generate a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF System. The NEF for the foregoing specifically identifies recipients of electronic notice.

Executed on July 24, 2023.

s/ Dennis McGlothin

DENNIS J. McGLOTHIN